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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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information to many businesses, such as mortgage brokers, travel agents, and publishers of trade circulations that heavily rely on receiving vital business information via fax.

The Commission's new fax rules eliminate the established business relationship ("EBR") exception, thereby prohibiting faxes unless the sending party has obtained express, written consent from each recipient. The withdrawal of the established business relationship exception, which may or may not have been subject to required APA notice-and-comment requirements, at the very least represents an abrupt and unexpected change in the Commission's rules. It is no exaggeration to say that the Commission's surprising abandonment of the EBR exception caught all aspects of industry, from large to small businesses, off-guard. Given the substantial nature of the rule change, and for the reasons stated herein, thirty days is insufficient time for businesses to comply with the new fax rules. Accordingly, the Business Users Coalition requests a stay of at least six months so that businesses can review and understand these profound rule changes,<sup>1</sup> which are already subject to a Petition for Reconsideration,<sup>2</sup> and then obtain the necessary written authorizations from the organizations with which they do business.

The task of obtaining the necessary written authorizations is so large because the dependence of businesses on regular faxed information is so great. Tens of millions of businesses rely on facsimiles to receive crucial, timely information. And the recipients receive the faxes from a variety of sources. The information disseminated by facsimile includes listings

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<sup>1</sup> It may be that even six months is insufficient time to obtain and provide the necessary consents to allow those parties that rely on receiving information by facsimile to continue to receive faxes. Accordingly, the Business Users Coalition may return to the Commission to request a further stay of the rules, with the goal of complying with the new rules without causing a costly interruption in service.

<sup>2</sup> The American Society of Association Executives filed an Emergency Petition for Clarification on July 25, 2003. Members of the Business Users Coalition will file a petition for reconsideration by the August 25, 2003 deadline.

of mortgage rates and products offered by wholesale lenders and other entities to mortgage brokers, available inventory for small travel agencies, re-qualification information for trade publications, and industry news for trade associations. The Business Users Coalition is confident that its members, and others, will give their express consent to continue to receive important information via facsimile, but it is not practical to assume tens of millions of businesses can comply with the new rules—providing consent to all companies that send them information—in only thirty days. To prevent an interruption in this service, which would be costly to businesses and consumers alike, the Business Users Coalition respectfully requests a stay of the Order’s effective date relating to unsolicited facsimile advertisements.

## **II. Statement of Interests**

The American Society of Travel Agents (“ASTA”) is the world’s largest association of travel professionals. Its more than 20,000 members include travel agents and the companies whose products the agents sell, such as tours, cruises, hotel rooms, and car rentals. The travel industry accounts for roughly 18 million pages of faxes a month, primarily from service providers to agents.

The Mortgage Bankers Association of America (“MBA”) is a national trade association representing the real estate finance industry. Its membership of approximately 2,600 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field. The mortgage industry originated \$2.5 trillion in residential mortgages in 2002, and MBA estimates that its members alone originated at least \$90 billion in commercial real estate loans in 2002. MBA’s mortgage company members use facsimiles primarily to notify other mortgage industry participants, such as mortgage brokers, of products they are willing to purchase or fund and at what prices. The benefit of this wholesale/broker relationship is to make interstate

mortgage money easily accessible. Borrowers benefit from this free flow of business information because brokers are made aware of thousands of investors' products and prices. If brokers are faced with impediments to obtaining this information, consumers will have fewer choices of mortgage products and rates.

The National Association of Mortgage Brokers ("NAMB") is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry. NAMB has more than 16,000 members and represents mortgage brokers in all 50 states and the District of Columbia. While many factors have contributed to the recent record rate of home ownership, one of the principal factors has been the rise of wholesale lending through mortgage brokers. Mortgage brokers have brought consumers more choices in loan programs and products than they can obtain from a branch office of even the largest national retail lender. Mortgage brokers offer lenders a far less expensive alternative for nationwide product distribution without huge investments in "bricks and mortar." NAMB's members use facsimiles for many functions including receiving product lists, together with applicable rates, from the wholesale lenders with which they do business together with others seeking the mortgage brokers' business. Mortgage brokers also send their product lists, together with applicable rates, to entities such as realtors. Consumers benefit from the free passage of this information in that more products become available for consumers and increased competition among originators can lower costs to consumers.

The Consumer Mortgage Coalition ("CMC") is a trade association of national residential mortgage lenders, servicers, and service providers, including both independent businesses and members of large, diversified financial services holding companies. CMC represents some of the nation's largest fully-private participants in the residential mortgage

business, each of which is a heavy user of facsimiles to communicate with its business partners, including mortgage brokers, loan correspondents, credit enhancers, outsource service providers, appraisers, title insurance companies, and other real estate settlement providers. Any action that would restrict the ability of our members to communicate with its business partners will severely impede the ability of our members to make home mortgage loans.

The Midwest Circulation Association (“MCA”) is a group of Midwestern magazine circulation professionals. MCA members meet throughout the year to share trends in magazine subscription promotion, computer fulfillment, circulation audit requirements, and postal affairs.

### **III. Discussion**

In deciding whether to grant a stay of its rules, the Commission has said it will “consider requests for interim or injunctive relief on a case-by-case basis,” and has “expressly declined to delineate procedural requirements or a single evidentiary standard applicable to all requests.” *In re AT&T Corp.*, 13 FCC Rcd 14,508 (1998) (internal quotations omitted). As a general matter, however, the Commission will follow the standard for injunctive relief used in federal court, which sets forth four relevant factors: “(1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is not granted; and (4) that the issuance of the order will further the public interest.” *Id.* (citing *Virginia Petroleum Jobbers Ass’n v Fed. Power Comm’n*, 259 F.2d 921 (D C Cir. 1958)). Not all factors need be established, and “no single factor is necessarily dispositive ” *Id.*

**A. Likelihood of Success on the Merits.** The members of the Business Users Coalition will file a Petition for Reconsideration and Clarification, targeted to at least two issues, and perhaps more as its members understand the full ramifications of the Commission’s

new fax rules. First, we will request, at minimum, a six month time period in which to give or obtain consent. For the reasons outlined above, thirty days is inadequate and unreasonable to obtain consent that must be (a) express and (b) written but cannot be (y) obtained by a fax nor (z) by oral consent. And it must be obtained by every recipient of “advertisements,” even those persons with whom the sender has a longstanding established business relationship. Given the substantial changes wrought by the Commission’s new fax rules, it is arbitrary and capricious for the Commission to not permit more time for companies to come into compliance. Second, we will seek a clarification of the manner in which express consent may be given. We expect the Commission to grant the petition for reconsideration because the rules adopted by the Commission are simply unworkable in their current form, and the changes that the Petition will seek are consistent with the reasonable consumer protection and privacy goals set forth in the Order. Thus, the Petition will suggest more feasible methods of obtaining the requisite consent.

**B. Threat of Irreparable Harm.** Fax broadcasting is used to disseminate hundreds of millions of messages a year to tens of millions of businesses. Under the Commission’s new fax rules, by August 25, 2003, all of these business and non-profit group providers of information must receive express, written consent from the millions of businesses with which they do business and communicate by facsimile if they wish to continue to provide information in this manner. Businesses that are unable to send or receive fax information will suffer significantly if the requisite consent has not been obtained in time.

Fax broadcasting is an important tool used by large and small companies, industry associations, and other non-profit organizations to send information *effectively and efficiently* to small businesses. In turn, the information received by facsimile is crucial to businesses in

numerous industries. Many businesses are either not equipped to receive the same information by electronic mail or find it an inefficient manner to receive the information.

The mortgage industry is a prime example.<sup>3</sup> Xpedite Systems, Inc., a fax broadcaster which accounts for a significant share of the fax broadcasting market, sends roughly 10 million pages of mortgage information each month by fax. The bulk of this traffic is sent from major financial institutions and insurance companies to mortgage brokers. The mortgage brokers use the rate sheets and other information received by fax to set prices on a variety of different mortgage products, which are then offered to consumers. The residential mortgage industry typically does not use passive means, such as Internet sites, to provide rate and product information to brokers and correspondents. Rather, the information in the industry is conveyed via facsimile because that is the preferred means and is the most user-friendly for the nature of that industry. Under the new fax rules, within thirty days all mortgage brokerage businesses, of all sizes, would have to provide express, written consent to *every* financial institution and insurance company from which it receives rate information.

The travel industry is another sector that relies heavily on sending and receiving information via facsimile. The travel sector makes up roughly 10% of the fax broadcasting industry. Small travel agencies across the country receive information on the availability of cabins on cruises, seats on airlines, hotel rooms, and other travel information via facsimile. Xpedite alone faxes roughly 5 million pages monthly from travel services providers to travel agencies. Travel agencies use faxed information not only to keep apprised of availability, but also to learn of special fares and promotions that can be passed on to consumers. This is another

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<sup>3</sup> The mortgage industry comprises nearly a quarter of the entire fax broadcasting market, with another 11% coming from other financial services.

important industry that would suffer, as would consumers, were it no longer able to provide and receive information efficiently. Moreover, the local travel agencies would have to obtain written consent from all of their established customers to whom they send relevant information.

*Trade publications are crucial to getting information on news, trends, practices, and new products and services to the industries they cover. Publishers of commercial trade magazines are frequently in contact with their readers through faxes. Most industries have magazines of this type, which serve to disseminate business information. Many trade magazine subscriptions are free to readers who “qualify” by questionnaire. Annual faxes keep the mailing list up-to-date, confirm reader qualification, and comply with United States Postal Service standards for Periodicals mail, resulting in postage discounts for magazine delivery. Without this fax re-qualification process,<sup>4</sup> trade magazines will suffer along with the readers and industries they serve.*

In its “Emergency Petition for Clarification,” the American Society of Association Executives (“ASAE”) explains the importance the non-profit sector puts on communicating by facsimile. ASAE states that non-profit organizations, including trade associations, professional societies, chambers of commerce, advocacy organizations, and charitable, scientific, and religious organizations, among others, exceed half a million in number. These non-profit groups, ASAE explains, use fax broadcasting to deliver important information to their constituencies.

It is completely impractical to assume express, written consent can be obtained from the tens of millions of businesses that rely on information by fax in the thirty days given in

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<sup>4</sup> Up to 40% of re-qualification is done by facsimile.

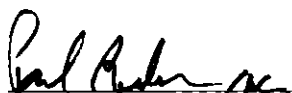
the Order, and if such consent is not obtained, those parties which rely on such information will be significantly harmed.

**C. Degree of injury to other parties.** The injury suffered by the granting of a stay is minimal and far outweighed by the public interest benefits described herein. The vast majority of facsimiles that the Business Users Coalition members send go to businesses, mostly small businesses, and such faxes go to recipients that have an established business relationship with the sender. These businesses (both senders and recipients) have been operating under the “established business relationship” exception for more than a decade without any major problems. A temporary stay to afford them the time to review and understand the rules and come into compliance with the new rules will not cause harm to consumers.

**D. Public interest showing.** Granting a temporary stay in order to permit small businesses and their associations time to comply with the new rules is in the public interest. All parties—senders, recipients, and consumers—benefit from the important information relayed via facsimile, including mortgage brokers that must have up to date rate information to properly structure mortgage transactions and travel agents who must be informed of space availability and pricing. In the end, the information that is vital for the business recipients also makes the market more efficient, and therefore benefits consumers. The vast majority of businesses in America are small businesses, and small businesses depend disproportionately on faxed information, because it is cheaper and easier to maintain than e-mail or Internet connections. The nature of today’s economy makes life difficult for large and small businesses alike, and a temporary stay of a Commission rule that could interfere with the critical flow of information to these companies certainly advances the public interest.

## Conclusion


For the reasons set forth above, the Commission should grant, at minimum, a six month stay of the effective date of the rules adopted in the Order as they pertain to unsolicited facsimile advertisements, or in the alternative until all Petitions for Reconsideration have been resolved



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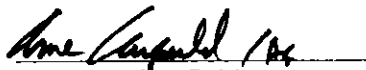
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Dated August 7, 2003

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Courtesy copies of the foregoing Petition for Emergency Stay were delivered this

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